

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MIHAITA CONSTANTIN,
Plaintiff,

CASE NO. CIV 04-1247 WBS

v.

ORDER

COUNTY OF SACRAMENTO;
SACRAMENTO COUNTY SHERIFF'S
DEPARTMENT; SHERIFF LOU
BLANAS, individually and in
official capacity as Sheriff
of the Sacramento County
Sheriff's Department; DEPUTY
C. MASON; DEPUTY PARKER;
DEPUTY MORCK; DEPUTY PAI;
DEPUTY DE LA CRUS; DOES I
through XXX, inclusive,

Defendants.

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Presently before the court is defendants' motion for
summary judgment pursuant to Federal Rules of Civil Procedure 56
and 25. No opposition has been filed.

I. Factual and Procedural Background

On or about July 13, 2003, plaintiff was arrested by
the California Highway Patrol and placed into a holding cell at

1 the Sacramento Main Jail at 541 "I" Street in Sacramento,
2 California. (Compl. ¶ 13.) While in custody, plaintiff was
3 allegedly assaulted without provocation by officers of the
4 Sacramento County Sheriff's Department. (Id. ¶ 14.) On June 29,
5 2004, plaintiff filed a complaint alleging various constitutional
6 violations under 42 U.S.C. § 1983 and the following state law
7 claims: negligent hiring, training, supervision and retention;
8 negligence; assault; battery; conspiracy; and negligent and
9 intentional infliction of emotional distress. (Compl.)
10 Plaintiff sought compensatory, general, special, punitive, and
11 exemplary damages against each defendant. (Id. at 11 (prayer for
12 relief).)

13 Plaintiff died in a car accident on May 14, 2005.
14 (Aug. 26, 2005 Statement of Fact of Death of Pl.) Plaintiff's
15 attorney filed a statement of fact of death of plaintiff,
16 pursuant to Federal Rule of Civil Procedure 25, stating only that
17 plaintiff is deceased, on August 26, 2005. (Id.) Later, on
18 December 6, 2005, defendants filed a supplemental statement of
19 fact of death of plaintiff and request for judicial notice,
20 attaching a copy of the death certificate of Mihaita Constantin
21 and noting that the court has appointed Lucian Stanciu special
22 administrator of decedent's estate. (December 6, 2005 Supp.
23 Statement of Fact of Death of Pl. and Request for Judicial
24 Notice.)

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II. Discussion

Rule 25(a)(1) provides that:

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. . . . Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of the statement of fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

Fed. R. Civ. P. 25(a)(1). Further, Rule 25 specifies that a motion for substitution may be made by any party or by the successors or representatives of the deceased party. Id.

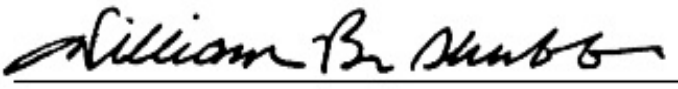
Plaintiff's former attorney's filing of August 26, 2005 cannot be a "suggestion of death" that would trigger the 90-day limitation on filing a motion for substitution, because it was not filed by a party or by a successor or representative for the deceased party. See Fehrenbacher v. Quackenbush, 759 F. Supp. 1516, 1518 (D. Kan. 1991) (quoting Charles A. Wright et al., Federal Practice and Procedure § 1955 at 545 (2d ed. 1986)) ("The attorney for the deceased party may not make the suggestion of death since he is not himself a party to the action and, since his authority to represent the deceased terminated on the death, he is not a 'representative of the deceased party' of the sort contemplated by the rule."); Rende v. Kay, 415 F.2d 983, 985 (D.C. Cir. 1969) (holding that "[a]lthough the attorney for the defendant was retained to 'represent' the deceased as his counsel, he is not a person who could be made a party, and is not a 'representative of the deceased party' in the sense contemplated by Rule 25(a)(1)").

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1 However, defendants' subsequent filing of December 6,
2 2005 did start the 90-day period running because it was filed by
3 a party. The 90-days from that date have now expired, and no
4 motion for substitution has been filed.¹

5 IT IS THEREFORE ORDERED that this action be, and the
6 same hereby is, DISMISSED.²

7 DATED: March 18, 2006

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10 WILLIAM B. SHUBB
11 UNITED STATES DISTRICT JUDGE
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21 ¹ The court recognizes that Fed. R. Civ. P. 6(b) would
22 authorize it to extend the time in which to file a motion for
23 substitution either before or after the expiration of the ninety-
24 day period. See Dukens Kernisant v. City of New York, 225 F.R.D.
25 422, 427 (E.D.N.Y. 2005) (citing Charles A. Wright et al.,
26 Federal Practice and Procedure § 1955 at 546 (2d ed. 1986)); see
also Kaubisch v. Weber, 408 F.3d 540, 541 (8th Cir. 2005).
However, no application for such an extension has been made, and
in light of plaintiff's counsel's apparent lack of interest in
proceeding with this case the court sees no valid reason to enter
such an order sua sponte.

27 ² Defendants' alternative motion for partial summary
28 judgment on the state law claims and the claims for pain and
suffering and punitive damages need not be considered because it
is rendered moot by this order.